LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 11

NICO JACOBELLIS,
Appellant,

against

STATE OF OHIO,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF AMERICAN AND OHIO CIVIL LIBERTIES UNIONS AS AMICI CURIAE.

BERNARD A. BERKMAN,
1748 Standard Building,
Cleveland, Ohio,

JACK G. DAY,
1748 Standard Building,
Cleveland, Ohio,

MELVIN L. WULF,
156 Fifth Avenue,
New York, N. Y.,

Attorneys for American Civil Liberties Union and Ohio Civil Liberties Union.

HERBERT B. LEVINE,
1130 Keith Building,
Cleveland, Ohio,

FRED D. SHAPIRO,
1804 Standard Building,
Cleveland, Ohio,

Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

TABLE OF CONTENTS.

Interest of Amici 1

Statement of Facts 3

Summary of Argument 4

Argument 5

I. All Utterances Are Within the Protection of the First and Fourteenth Amendments and May Not be Punished Unless There Is a Clear and Present Danger That They Will Bring About a Substantive Evil 5

II. The Roth Test of Obscenity is Vague and Unworkable and Tends to Inhibit the Dissemination of Expression Which is Not Obscene and Clearly Within the Protective Scope of the First and Fourteenth Amendments 16

A. Obscenity Standards of Sex Portrayal 20

B. Contemporary Community Standards 26

1. The "contemporary community standards" test is too vague to inform and therefore violates due process of law by not providing an ascertainable standard of guilt 26

2. The "community" standard exposes the basic constitutional rights guaranteed the individual to the vagaries of public opinion in violation of the First and Fourteenth Amendments 32

3. The application and administration of the standard, even if it is otherwise constitutional, may violate due process of law contrary to the Fourteenth Amendment 34

C. The "Average Person" 36

D. Determining What is "Utterly Without Redeeming Social Importance" 38

III. The Due Process Clause of the Fourteenth Amendment, as It Incorporates the First Amendment, Requires That the Scienter Necessary For an Obscenity Conviction Be Knowledge of the Obscene Nature of the Material 41

IV. The Conviction of the Defendant-Appellant on a Count of Possession and Control and Also on a Count of Exhibition is Double Conviction For the Same Offense and in Violation of the Due Process Clause of the Fourteenth Amendment 54

Conclusion 61

TABLE OF AUTHORITIES.

Cases.

Ackerman vs. United States, 293 F. 2d 449 (9th Cir. 1961) 28

Alexander vs. United States, 271 F. 2d 140 (8th Cir. 1959) 27-28

American Mercury, Inc. v. Chase, 13 F. 2d 224 (D. C. Cir. 1926) 40

Bantam Books Inc. v. Melko, 25 N. J. Super. 292, 96 A. 2d 47 (1950) 40

Beauharnais vs. Illinois, 343 U. S. 250 (1952) 10

Big Table, Inc. v. Schroeder, 186 F. Supp. 254 (N. D. Ill. 1960) 29, 35

Blockburger v. U. S., 284 U. S. 299 (1932) 56, 60

Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952) 41

Butler v. Michigan, 352 U. S. 380 (1957) 30, 36

Collier vs. United States, 283 F. 2d 780 (4th Cir. 1960) cert. denied 365 U. S. 833 (1961) 28

Columbia Pictures Corp. v. Chicago, 184 F. Supp. 817 (N. D. Ill. 1959) 29

Commonwealth vs. Feigenbaum, 166 Pa. Super. 120, 70 A. 2d 389 (1950) 9

Commonwealth vs. Gordon, 66 Pa. D. & C. 101 (1949) 9, 23, 25

Commonwealth v. Isenstadt, 318 Mass. 543, 62 N. E. 2d 840 (1945) 37

D. C. v. Buckley, 128 F. 2d 17 (1942) 55, 56, 58

Dennis vs. United States, 341 U. S. 494 (1951) 7, 10, 11, 40, 41

Flying Eagle Publications, Inc. v. United States, 273 F. 2d 799 (1st Cir. 1960) 29

Gitlow v. New York, 268 U. S. 652 (1925) 42

Gore v. U. S., 357 U. S. 386 (1958) 57

Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (S. D. N. Y. 1959), *aff'd* 276 F. 2d 433 (2d Cir. 1960) 15, 35

Hannegan vs. Esquire, 327 U. S. 146 (1946) 11

Kahm v. United States, 300 F. 2d 78 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962) 28, 35

Kingsley International Pictures Corporation v. Regents of the University of the State of New York, 360 U. S. 684 (1959) 2, 15, 18

Klaw v. Schaffer, 151 F. Supp. 534 (S. D. N. Y., 1957) 29, 30, 34

Lerner vs. State, 81 N. E. 2d 282 (1948) 28

Manual Enterprises, Inc. et al. v. Day, 289 F. 2d 455 (D. C. Cir. 1961), *reversed* 370 U. S. 478 (1962) 18, 21, 29, 30, 31, 37, 46

Mapp v. Ohio, 367 U. S. 643 (1961) 59

Mounce vs. United States, 355 U. S. 180, *reversing* 247 F. 2d 148 (9th Cir. 1957) 18, 28, 29

Mutual Film Corporation v. Industrial Commission, 236 U. S. 230 (1915) 41

National Association for the Advancement of Colored People, etc. v. Button, ____ U. S. ____, 31 U. S. L. Week 4063, 4067 (U. S. Jan. 14, 1963) 22

New American Library v. Allen, 114 F. Supp. 823 (N. D. Ohio 1953) 40

Ohio vs. Jacobellis, 173 Ohio St. 22 (1962) 6, 27, 49, 59

Ohio vs. Mapp, 170 Ohio St. 427 (1960) 6, 59

Olmstead v. United States, 277 U. S. 437 (1928) 3

One, Inc. v. Olesen, 355 U. S. 371 (1958) *reversing* 241 F. 2d 772 (9th Cir. 1957) 18

Overmyer v. Sacks, 174 O. S. 129 (1962) 57

Poss vs. Christenberry, 179 F. Supp. 411 (S. D. N. Y. 1959) 28, 35

Public Utilities Commission vs. Pollak, 343 U. S. 451 (1952) 12

Regina vs. Hicklin, [1868] L. R. 3 Q. B. 360 ..... 17, 20, 30, 36

Rochin v. California, 342 U. S. 165 (1952) 58

Roth v. United States, 354 U. S. 476 (1957) 4, 5, 10, 13, 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, 28, 29, 30, 32, 36, 38, 39, 40, 51, 62

Schenck vs. United States, 249 U. S. 47 (1919) 6, 7, 11

Smith v. California, 361 U. S. 147 (1959) 2, 4, 18, 31, 34, 40, 42, 43, 45, 47, 49, 52, 53

Speiser v. Randall, 357 U. S. 513 (1958) 46

State v. Weed, 169 N. E. 2d 39 (Ohio Ct. App. 1954) 60

State v. Wetzel, 173 O. S. 16 (1962) 59

Sunshine Book Co. v. Summerfield, 355 U. S. 372 (1958) *reversing* 249 F. 2d 114 (D. C. Cir. 1957) 18, 28

Times Film Corp. v. City of Chicago, 355 U. S. 35, *reversing* 244 F. 2d 432 (7th Cir. 1957) 18

Times Film Corp. v. Chicago, 365 U. S. 667 (1961) 2

United States v. Frew, 187 F. Supp. 500 (E. D. Mich. 1960) 28, 29

United States vs. Kennerley, 209 Fed. 119 (S. C. N. Y. 1913) 20

United States vs. Keller, 259 F. 2d 54 (3rd Cir. 1958) 27

United States vs. Oakley, 290 F. 2d 517 (6th Cir. 1961), cert. denied 368 U. S. 388 (1961) 28

U. S. v. One Book Called "Ulysses," 5 F. Supp. 182 (S. D. N. Y. 1933), *aff'd* 72 F. 2d 705 (2d Cir. 1934) 36

United States v. 31 Photographs, 156 F. Supp. 350 (D. C. S. D. N. Y. 1957) 30

U. S. v. Roth, 237 F. 2d 796 (2d Cir. 1956) 22, 23, 32, 35, 36

United States vs. West Coast News Co., 30 F. R. D. 13 (W. D. Mich. 1962) 28

Whitney vs. California, 274 U. S. 357 (1927) 6

Wieman v. Updegraff, 344 U. S. 183, 97 L. ed. 216, 73 S. Ct. 215 ..... 43, 46

Winters v. New York, 333 U. S. 507 (1948) 15, 36

Womack vs. United States, 294 F. 2d 204 (D. C. Cir. 1961), cert. denied 365 U. S. 859 (1961) 28, 35

Zenith International Film Corp. vs. Chicago, 291 F. 2d 785 (7th Cir., 1961) 28, 35

Texts and Articles.

Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1942) 22

33 *Am. Jur.*, § 5, Libel and Slander 10

American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10(2), Comments, p. 10 ..... 12, 21, 22

Cairns, Paul and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 (May, 1962) 23

24 *C. J. S.*, Criminal Law, Sec. 1567b(c) 56

53 *C. J. S.*, § 4, Libel and Slander 10

Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) 23

Kalven, *Metaphysics of The Law of Obscenity*, Supreme Court Review (Univ. of Chicago Press, 1960) 19

Kinsey, *Sexual Behavior in the Human Male* (1948) 13

Kinsey, *Sexual Behavior in the Human Male* (1948), at 217 *et seq.* 37

Kronhausen, *Pornography and the Law* (1959), at 155 *et seq.* 37

Lawrence, *Pornography and Obscenity in Sex Literature and Censorship* 74-77 (1953) 38

Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960) 19

Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 387 (1954) 23

Lockhart & McClure, *Obscenity and the Courts*, 20 Law and Contemp. Probs. 587, 595 (1955) 22

Mead, *Sex and Censorship in Contemporary Society*, New World Writings (Third Mentor Selection 1953) at pp. 18-19 38

Mill, *Essay on Liberty* 7, 14, 39

Note, Constitutional Law—The Problem with Obscenity, 11 *West Res. Law Rev.* 669, 670 (1960) 12

Report of the Committee on Forensic Psychiatry, Group for the Advancement of Psychiatry (No. 9, Rev. 1950) 37

Constitution and Statutes.

Constitution of the United States:

First Amendment 1, 4, 5, 6, 10, 11, 14, 16, 17, 26, 32, 42, 53, 62

Fourteenth Amendment 1, 4, 5, 16, 17, 26, 32, 34, 41, 44, 53, 62

Ohio Revised Code, Sec. 2905.34 ..... 3, 54, 59

In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 164.

NICO JACOBELLIS,

Appellant,

against

STATE OF OHIO,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF AMERICAN AND OHIO CIVIL LIBERTIES UNIONS AS AMICI CURIAE.

INTEREST OF AMICI.

The American Civil Liberties Union and its Ohio affiliate, the Ohio Civil Liberties Union, are organizations dedicated to the preservation and extension of civil liberties, and particularly the freedoms protected by the Bill of Rights of the United States Constitution.

This brief of *amici curiae* is filed because it appears to us that the felony conviction of a motion picture exhibitor for showing a motion picture to the public about whose aesthetic merit responsible opinion varies widely abridges the freedom of expression guaranteed by the First and Fourteenth Amendments—both as to the right of the distributor to disseminate and the corresponding right of members of the adult public to exercise their freedom of choice in determining for themselves what forms of artistic and literary expression they will experience.

Our interest is not in the protection of smutty motion pictures, nor do we presume to judge the artistic merit of the motion picture whose exhibition caused defendant-appellant's conviction here. Neither is our concern limited to our objection to the suppression of the particular film here involved. Suppressed, in addition to the film, is the courage of this movie exhibitor and others to show the entire spectrum of artistic creativity the medium affords, upon fear of future prosecutions. And the public is thereby the loser.

It is our conviction that censorship of any form of expression is repugnant to a free society. As Mr. Justice Douglas has pointed out:[1]

> "No more potent force in defeat of * * * freedom could be designed than censorship. It is a weapon that no minority or majority group, acting through government, should be allowed to wield over any of us."

Mr. Justice Black, concurring in *Smith v. California*, 361 U. S. 147, 160 (1959), has suggested the principal reason for our concern for the outcome of this "obscenity" conviction:

> "While it is 'obscenity and indecency' before us today, the experience of mankind—both ancient and modern—shows that this type of elastic phrase can, and most likely will, be synonymous with the political and maybe with the religious unorthodoxy of tomorrow."

In the firm belief that "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit," [2] and in the hope that it will be of some assistance to the Court in dealing with its great task

---

[1] In his dissenting opinion in *Times Film Corp. v. Chicago*, 365 U. S. 667 (1961).

[2] *Kingsley Int'l Pictures Corp. v. Regents*, 360 U. S. 684, 695 (concurring opinion by Mr. Justice Frankfurter).

of preserving freedom of expression from "insidious encroachment by men of zeal, well-meaning but without understanding,"[3] this brief is filed.

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

STATEMENT OF FACTS.

The appellant, manager of the Heights Art Theater in Cleveland Heights, Ohio, was indicted and convicted by a three-judge court for separate counts of possession and exhibition of the film "The Lovers," which the court found to be an obscene motion picture within the meaning of Section 2905.34 of the Ohio Revised Code.

The holding of the trial court and the pertinent language in its opinion is set out below:

> "It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd and lascivious within the definition, description, and test set forth in *Roth v. United States*, (June 24, 1957) 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. "Les Amants" (or The Lovers) has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, *the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest.* It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film." (Emphasis supplied.) 12a, Appendix, Plaintiff-Appellant's Jurisdictional Statement.

---

[3] *Olmstead v. United States*, 277 U. S. 437, 479 (1928).

The appellant was sentenced to pay a fine of $500.00 on the possession count and $2000 on the exhibition count, a total fine of $2,500.00, and to be imprisoned until the fine was paid. Pending this appeal, sentence has been stayed.

SUMMARY OF ARGUMENT.

Inasmuch as the defendant-appellant was convicted on counts of possession and exhibition of an obscene film under the verbal formula contained in *Roth v. United States*, 354 U.S. 476 (1957), for determining what is constitutionally obscene, and therefore outside the protections of the First and Fourteenth Amendments, it is appropriate for *Amici Curiae* in urging reversal of the conviction below, to re-examine that holding. In light of the imperatives of freedom of expression and the decisions and sociological studies since the enunciation of the *Roth* rule, we urge the Court to reconsider certain aspects of that decision.

We contend that:

I. All utterances are within the protection of the First and Fourteenth Amendments and may not be punished unless there is a clear and present danger that they will bring about a substantive evil.

II. The *Roth* test of obscenity is vague and unworkable and tends to inhibit the dissemination of expression which is not obscene and clearly within the protective scope of the First and Fourteenth Amendments.

Moreover, this case squarely presents the question specifically left open in *Smith v. California*, 361 U. S. 147 (1959), as to the *kind* of knowledge of the material alleged to be obscene which a defendant must possess before an obscenity conviction is constitutionally valid, and the fur-

ther question whether a conviction for both possession and exhibition of an obscene film is double conviction for the same offense and, therefore, in violation of the due process clause of the Fourteenth Amendment.

We contend that:

III. The due process clause of the Fourteenth Amendment, as it incorporates the First Amendment, requires that the *scienter* necessary for an obscenity conviction be *knowledge of the obscene nature of the material.*

IV. The conviction of the defendant-appellant on a count of possession and control and also on a count of exhibition is double conviction for the same offense and in violation of the Fourteenth Amendment.

Each of these contentions will be discussed in sequence and in detail below.

ARGUMENT.

I. ALL UTTERANCES ARE WITHIN THE PROTECTION OF THE FIRST AND FOURTEENTH AMENDMENTS AND MAY NOT BE PUNISHED UNLESS THERE IS A CLEAR AND PRESENT DANGER THAT THEY WILL BRING ABOUT A SUBSTANTIVE EVIL.

The explicit basis for the instant conviction is the Court's holding in *Roth vs. United States*, 354 U. S. 476 (1957).[4] We respectfully urge the Court to reconsider that decision.

Roth held that obscenity was outside the area of speech and press protected by the First Amendment. It

[4] The material involved in *Roth* was so-called hard-core pornography whereas no such material is involved in the instant case. However, *Roth* has in fact been applied here by the lower courts because the opinion in *Roth* was not explicitly limited to hard-core pornography.

also held that, in order to punish for obscenity, there need not be a showing or a consideration of the issues behind the "clear and present danger" rule. We believe that these holdings open the door to federal and state intrusion into the area of speech and press beyond the point permitted by the First Amendment.

The starting point for an examination of the problems arising from the expression of opinion and utterances is, of course, in the thinking processes of the individual, in which the state can have no legitimate interest. Even the Ohio Supreme Court adopts this as a postulate. See *Ohio vs. Jacobellis*, 173 Ohio St. 22, 27 (1962); *Ohio vs. Mapp*, 170 Ohio St. 427 (1960). However, the mere formulation of opinions by individuals is meaningless unless they are allowed to express those opinions to others. It is in this area of verbal or visual expression of individual thought that the problems arise.

It is our position that obscenity, as much as any other form of speech or press, is entitled to the protection of the First Amendment. Accordingly, the question in a case involving obscenity, just as in every case involving an attempted restriction upon free speech, is whether the words or pictures are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about a substantive evil that the state has a right to prevent. See *Schenck vs. United States*, 249 U. S. 47 (1919); *Whitney vs. California*, 274 U. S. 357 (1927) (dissenting opinion). There is no evidence in the record that the motion picture involved in this case presents such a clear and present danger; in addition, we believe that, under the current state of knowledge, there is grossly insufficient evidence to show that obscenity brings about *any* substantive evil.

The clear and present danger rule, as applied to speech, has had a somewhat uneven existence since its promulgation in the *Schenck* case. The Court, in *Dennis vs. United States*, 341 U. S. 494 (1951), modified the rule substantially. After finding that, in many of the instances in which the rule had previously been applied, it had been determined that the interest the state was attempting to protect was too insubstantial to warrant restriction of speech, the Court adopted a test set forth by Judge Learned Hand, as follows:

> "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U. S. 494, 510.

It therefore appears that the present day statement of the rule is to determine the evil from which the state is to be protected,[5] determine its gravity, and then to discount the gravity of that evil by its improbability of occurrence. While we do not agree with this modification of the clear and present danger rule, we believe that obscenity does not even fall within an area of speech proscribed by the modified rule.

The question thus becomes one of first determining whether the use of obscenity presents an evil to the state. This test was stated in 1859, with perhaps a different emphasis on the particular nature of the evil that must be found, in John Stuart Mill's "Essay on Liberty." He stated:

> "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings

---

[5] The evil which the Court found in *Dennis* was the serious danger of the overthrow of the government by force and violence. 347 U. S. 494, 509.

> of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. *To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else.* * * * Over himself, over his own body and mind, the individual is sovereign." (Emphasis added.)

Mill felt that the appropriate region of human liberty demanded absolute freedom of thought and feeling on all subjects, including the "* * * practical or speculative, scientific, moral, or theological," and liberty of tastes and pursuits, even though the resulting conduct might be thought "* * * foolish, perverse, or wrong." However,

> "* * * No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may

justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind * * * But * * * [T]hat mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognizing all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions.

"* * *

"* * * [W]ith regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; *the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.*" (Emphasis added.)

Similarly, Judge Bok, writing in *Commonwealth vs. Gordon*, 66 Pa. D. & C. 101, affd. sub nom. *Commonwealth vs. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950), stated that an obscenity statute

"* * * may * * * be applied, in exercise of the police power, only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as a perceptible result of the publication and distribution of the writing in question: * * *" 66 Pa. D. & C. 101, 156.

The *Dennis* modification of the clear and present danger rule requires a finding of an evil, the gravity of which is such as to justify an invasion of free speech to avoid its occurrence. In *Roth* the Court stated that obscenity and libel are in the same class. It will be noted that the law of slander and libel requires *proof of harm to another* before there is an actionable wrong. 53 *C. J. S.*, § 4, Libel and Slander; 33 *Am. Jur.*, § 5, Libel and Slander. In *Beauharnais vs. Illinois*, 343 U. S. 250 (1952), the Court equated group libel with "* * * insulting or fighting words—those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace" (343 U. S. 250, 256) and found a danger of group libel inciting murder, exacerbating tension, and threatening violence and destruction.

However, there is no proof in this record in the instant matter of harm resulting to another from an obscene utterance. Certainly the right of free speech protected by the First Amendment is so important that no court should merely assume, without proof, that harm will result from its exercise.

The Court did not squarely meet this problem in *Roth*. It held, in effect, that obscenity is not within the area of constitutionally protected speech, and therefore it is unnecessary that there be shown any harm to others by its utterance. We submit that this begs the question. The *only* reason advanced by the Court for holding that obscenity is not within the protection of the First Amendment is that obscenity is "* * * utterly without redeeming social importance." 354 U. S. 476, 484.

Here the Court appears not to have followed even the *Dennis* modification of the clear and present danger rule. The test used in *Roth* was not whether the words were used in such circumstances and were of such a nature as

to create a clear and present danger that they would bring about a substantive evil (*Schenck, supra*); nor was it a test based upon determining the existence of an evil, the gravity of the evil, and the improbability of its occurrence (*Dennis, supra*). Instead, the sole test adopted by the Court is whether the utterance has redeeming social importance." We submit that the Court deviated from its prior standards in First Amendment cases, and that as a result the freedom guaranteed by the First Amendment has been seriously weakened.

John Stuart Mill felt that it was not within anyone's province to determine whether any utterance might have redeeming social importance. He stated, in his "Essay on Liberty":

> "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.
>
> "* * * We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."

" Compare *Hannegan vs. Esquire*, 327 U. S. 146, 157-158 (1946).

The inquiry therefore must return to a determination of whether obscenity involves a danger of bringing about a substantive evil, of whether some substantial important interest of the state is being violated. This requires an examination of the purpose underlying the enactment of the obscenity laws. It has been stated that such legislation is necessary because obscene material causes immoral conduct and that its suppression is necessary to the preservation of public morality.[7] See Note, Constitutional Law—The Problem with Obscenity, 11 *West Res. Law Rev.* 669, 670 (1960).

With respect to the contention that obscene material causes immoral conduct, the fact is that there are no facts—there is grossly insufficient evidence that the utterance of obscenity causes immoral conduct, the evil sought to be avoided.[8] We do not intend to belabor this point, because it has already been amply demonstrated that there is insufficient evidence that obscenity will lead to this evil.

---

[7] It has also been claimed that there is a danger of obscenity's stimulating "impure" sexual thoughts. However, this alleged evil relates to the incitement of mere thoughts, not overt *acts*, and hence is not a proper basis for inhibiting free speech. See American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10(2), Comments, p. 10.

It has also been stated that obscenity must be prohibited because it offends the sensibilities and feelings of the audience. This is clearly no reason for refusing to apply the protection of the First Amendment, so long as the utterer does not have the power to compel his audience to listen to or read the obscene material. If the audience chooses voluntarily to do so, this can be no basis for punishing the utterer unless it is shown that the resulting sexual thoughts lead to overt acts which are otherwise prohibited by law. As it has been said with respect to television and radio programs: if you don't like the program, just turn the dial. See *Public Utilities Commission vs. Pollak*, 343 U. S. 451, 468-469 (1952).

[8] The Court did not rule upon this point in *Roth*, because it felt that any such determination was unnecessary in view of its ruling that obscenity is not protected speech.

See *Roth*, *supra*, footnotes 21 and 22 and 354 U. S. 476 at 510-511 and cases and studies cited in footnote 26, *infra*.

With respect to the contention that the suppression of obscenity is necessary to the preservation of public morality, we recognize that the physical acts usually connoted by the term "obscenity" are generally condemned by the very strict moral code of our society, which has dictated that such conduct must be suppressed and considered in the nature of a sin.[9] Other societies in this world do not share our conventions. We need not decide whether any societal moral code is better than any other. However, we note the comment of John Stuart Mill, who stated in his "Essay on Liberty":

> "I have said that it is important to give the freest scope possible to uncustomary things, in order that it may in time appear which of these are fit to be converted into customs. But independence of action, and disregard of custom, are not solely deserving of encouragement for the chance they afford that better modes of action, and customs more worthy of general adoption, may be struck out; * * * If it were only that people have diversities of taste, that is reason enough for not attempting to shape them all after one model. But different persons also require different conditions for their spiritual development; and can no more exist healthily in the same moral, than all the variety of plants can in the same physical, atmosphere and climate. The same things which are helps to one person towards the cultivation of his higher nature are hindrances to another. * * * Why then should tolerance, as far as the public sentiment is concerned, extend only to tastes and modes of life which extort acquiescence by the multitude of their adherents?"

---

[9] Of course, the acts (or evils) which, it is alleged, may be caused by obscenity are *not* necessarily illegal; only under certain, carefully defined circumstances have they been proscribed by statute (e.g., adultery). Cf. *Kinsey, Sexual Behavior in the Human Male* (1948).

Certainly no one would deny that an individual is free to hold an opinion that a part of our sexual moral code may not be the only possible code. Let us postulate a situation in which that individual uses a vivid description of sex in an essay, novel or movie in an attempt to change the sexual mores of the audience. In other words, suppose that the author chooses to use a sexual description in a story to bring about such a change, and there is no evidence that the proposed change and the method of accomplishing it involve any violence or harm to others. Is the protection of the First Amendment to be denied the author because his ideas contravene those generally held by the society in which he writes (i.e., are deemed "immoral")? See e.g., Aldous Huxley, "Island"; George Orwell, "1984."

> "Mankind can hardly be too often reminded, that there was once a man named Socrates, between whom and the legal authorities and public opinion of his time there took place a memorable collision. * * * This acknowledged master of all the eminent thinkers who have since lived—whose fame, still growing after more than two thousand years, all but outweighs the whole remainder of the names which make his native city illustrious—was put to death by his countrymen, after a judicial conviction, for impiety and immorality. Impiety, in denying the gods recognised by the State; indeed his accuser asserted (see the 'Apologia') that he believed in no gods at all. Immorality, in being, by his doctrines and instructions, a 'corrupter of youth.' Of these charges the tribunal, there is every ground for believing, honestly found him guilty, and condemned the man who probably of all then born had deserved best of mankind to be put to death as a criminal." John Stuart Mill, "Essay on Liberty."

An author should not be punished if he chooses to expound his ideas through the use of certain materials.

> "The line between the informing and entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters vs. New York*, 333 U. S. 507, 510 (1948).

Indeed, this Court has already held that the use of such materials may not be proscribed where their use is to advocate a change in our sexual code.

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The state, quite simply, has thus struck at the very heart of constitutionally protected liberty." *Kingsley International Pictures Corporation v. Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959).

Nor may the use of such materials be proscribed where their use is to advocate a change in non-sexual areas of human behavior. *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (D. C. S. D. N. Y. 1959). Obviously, reluctance or abhorrence to the change advocated, whether sexual or non-sexual in nature, does not constitute a basis for denying the use of the materials; this is "the very heart of constitutionally protected liberty." In brief, the evil for which obscenity must be suppressed—the preservation of public morality—should not be denoted an "evil" in a free, constantly changing society such as ours; in fact the use of materials to advocate a change in "public morality" should be constitutionally protected in order to prevent a far greater evil—the enforced imposition by society of conformity in thoughts and ideas.

It therefore appears that obscenity statutes violate the First and Fourteenth Amendments because there is no demonstrable connection between the evil they are intended to avoid and the means chosen to avoid that evil. There is no clear and present danger that the utterances sought to be prohibited will bring about the evil to be avoided. Based on present day evidence, the improbability of the evils resulting from the conduct suppressed is so great that no invasion of free speech is warranted. Furthermore, some of the "evils" alleged are not evils in a society which cherishes and thrives on freedom and liberty. As the Court noted in *Roth*:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the states. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." 354 U. S. 476, 488.

II. THE ROTH TEST OF OBSCENITY IS VAGUE AND UNWORKABLE AND TENDS TO INHIBIT THE DISSEMINATION OF EXPRESSION WHICH IS NOT OBSCENE AND CLEARLY WITHIN THE PROTECTIVE SCOPE OF THE FIRST AND FOURTEENTH AMENDMENTS.

It has already been argued that the holding in *Roth v. United States*, 354 U. S. 476, 485 (1957), "that obscenity is not within the area of constitutionally protected speech or press" is a drastic curtailment of First Amendment protections.

We also urge that the standards expressed by the Court in *Roth* for determining what forms of expression

are "obscene," and therefore not entitled to constitutional protection, should be re-examined because they are vague, unworkable and tend to inhibit the dissemination of constitutionally protected expression.

Obscenity, as defined in *Roth*, is "material which deals with sex in a manner appealing to prurient interest," or "material having a tendency to excite lustful thoughts." Moreover, obscenity is "utterly without redeeming social importance." 354 U. S. at 484. Rejecting the standard of *Regina v. Hicklin*, [1868] L. R. 3 Q. B. 360, this Court substituted this test:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. at 489.

Thus the Court, having excepted "obscenity" from the protections of the First and Fourteenth Amendments, was faced with the task of describing the limits of the exception with sufficient particularity to insure constitutional protection for other "non-obscene" forms of expression.

That it failed, in the view of *amici*, in *Roth* and in subsequent cases, to delimit sufficiently precise boundaries for unprotected utterances demonstrates the difficulty of the assignment rather than the Court's failure to recognize the importance of its assigned task.[10]

Although *Roth* liberalized the *Hicklin* test of obscenity by requiring consideration of "the dominant theme of the material taken as a whole" and its effect upon "the average person" in lieu of judging the material "by the

---

[10] "It is * * * vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Roth v. U. S.*, 354 U. S. at 488.

effect of an isolated excerpt upon particularly susceptible persons," [11] and although many of the subsequent decisions of this Court following *Roth* have strictly limited obscenity convictions by the lower courts,[12] the test that *Roth* substituted has created as many problems as it has solved.

Mr. Chief Justice Warren[13], and Justices Black,[14] Douglas[15] and Harlan,[16] have themselves raised serious questions as to the wisdom of the *Roth* test of obscenity.

Mr. Justice Douglas's critique of the *Roth* verbal formula in his dissenting opinion in *Roth*, in which Mr. Justice Black concurred, lays bare its inherent defectiveness as a constitutional standard:

> "Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared

---

[11] *Roth v. U. S.*, 354 U. S. at 488-489.

[12] *Times Film Corp. v. City of Chicago*, 355 U. S. 35, *reversing* 244 F. 2d 432 (7th cir. 1957) (the movie, "The Game of Love," held: not obscene); *Mounce v. United States*, 355 U. S. 180, *reversing* 247 F. 2d 148 (9th cir. 1957) (an imported collection of nudist and art student publications containing many nude photographs, held: not obscene); *One, Inc. v. Olesen*, 355 U. S. 371 (1958) *reversing* 241 F. 2d 772 (9th cir. 1957) ("One—The Homosexual Magazine," held: not obscene); *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958) *reversing* 249 F. 2d 114 (D. C. Cir. 1957) ("Sunshine & Health" and "Sun Magazine," held: not obscene); cf. *Kingsley-Int'l Pictures Corp. v. Regents*, 360 U. S. 684 (1959) (the French motion picture, "Lady Chatterley's Lover," held: the statute under which conviction for exhibition of the film had been obtained violated the First Amendment's guarantee of freedom to advocate ideas); and see *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962) (homosexual magazines with photographs of nude or near nude male models, held: not obscene).

[13] Concurring in the result in *Roth*, 354 U. S. at 494-495.

[14] *Smith v. California*, 361 U. S. 147, 157 (1959) (concurring opinion).

[15] Dissenting in *Roth*, 354 U. S. at 512-514.

[16] Concurring in part and dissenting in part in *Roth*, 354 U. S. at 497-498.

with the First Amendment. Under the test, juries can censor, suppress, and punish what they don't like, provided the matter relates to 'sexual impurity' or has a tendency 'to excite lustful thoughts.' This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that 'censorship of obscenity has almost always been both irrational and indiscriminate.' * * * *The test adopted here accentuates that trend.*" (Emphasis supplied.)

* * * * *

"The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed."

* * * * *

"I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has 'no redeeming social importance.'

* * * * *

"For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless." 354 U. S. at 512, 513, 514.

Nor have the text-writers been silent in their criticism of the obscenity test formulated in *Roth*.[17]

---

[17] e.g. *Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); *Kalven, Metaphysics of The Law of Obscenity*, Supreme Court Review (Univ. of Chicago Press, 1960).

While *amici* have no quarrel with *Roth* insofar as it rejects the *Hicklin* rule of judging material by isolated passages and by its effect on particularly susceptible persons,[18] the test formulated in *Roth* presents a perplexing problem of application to those who would use the pronouncements of the Court for guidance in dealing with obscenity prosecutions.

FIRST: How are the standards of sex portrayal "in a manner appealing to prurient interest" and "having a tendency to excite lustful thoughts" to be applied in concrete cases?

SECOND: Which community's "contemporary standards" are to be applied? Is this a constitutional question or an issue for the trier of fact?

THIRD: Who is the "average person" whose "prurient interest" or "lustful thoughts" need be aroused before material may be adjudged obscene? What of material designed for a special audience?

FOURTH: How is the determination that material is "utterly without redeeming social importance" to be made? Is the determination to be made by the application of literary or artistic standards or left to the determination of juries?

A. Obscenity Standards of Sex Portrayal.

Since obscenity, as defined in *Roth*, is "material which deals with sex in a manner appealing to prurient interest," [19] it is necessary to inquire what, if any, constitutional

---

[18] See Judge Learned Hand's critical analysis of the defective and now-defunct *Hicklin* rule in *United States v. Kennerley*, 209 Fed. 119, 120-121 (S. C. N. Y. 1913).

[19] 354 U. S. 476, 487.

meaning "prurient interest" has. Apparently the term was appropriated from a proposed draft of the *Model Penal Code* of the American Law Institute.[20] The Institute's definition of "prurient interest" is "*shameful* or *morbid* interest in nudity, sex or excretion" [21] or "an *exacerbated, morbid,* or *perverted* interest growing out of the conflict between the universal sex drive of the individual and equally universal social controls of sexual activity." [22] (Emphasis supplied.) Are not these definitions descriptive of something other than normal sexual interest or arousal? Or did the Court intend some other meaning to be attached to the words "prurient interest"? If so, does the court equate "prurient interest" with normal sexual arousal? If not, what becomes of the "average person" whose sexual arousal determines whether or not utterances shall have constitutional protection? May an "average person" have an "*exacerbated, morbid* or *perverted*" sexual interest?

Nor is the latest pronouncement of members of this Court particularly illuminating in dealing with this problem. Although equating "prurient interest" with "impure desires relating to sex," Mr. Justice Harlan, speaking for himself and Mr. Justice Stewart, remarked:

> "* * * one would not have to travel far even among the acknowledged masterpieces in any of these fields [literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer." *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 82 S. Ct. 1432, 1437 (1962).

---

[20] A. L. I., Model Penal Code, Tent. Draft No. 6 (1957) § 207.10 (2): "A thing is obscene if, considered as a whole, its predominant appeal is to *prurient interest* * * *."

[21] *Ibid.*

[22] *Id.* at 29.

Moreover, since the Court in *Roth* defined obscenity not only as 'material which deals with sex in a manner appealing to prurient interest" but, in the alternative, as "material having a tendency to excite lustful thoughts," a concept expressly rejected by the American Law Institute,[23] it is not clear whether the Court intended to incorporate the *Model Penal Code* definition into its obscenity formula or whether, as Mr. Justice Harlan put it, the Court "merely assimilate[d] the various tests into one indiscriminate potpourri."[24] These ambiguities provide ample cause for concern "[b]ecause First Amendment freedoms need breathing space to survive," and therefore, "government may regulate in the area only with *narrow specificity*."[25] (Emphasis supplied.)

The studies of the behavioral sciences in this area further illuminate the difficulties involved in ascertaining a constitutionally valid meaning for "prurient interest." It is an acknowledged fact that the studies have failed to reveal a direct causal relationship between exposure to obscenity and overt anti-social conduct,[26] without more.

---

[23] "* * * We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." A. L. I., *Model Penal Code*, Tent. Draft No. 6 (1957) § 207.10(2). Comment, p. 10.

[24] 354 U. S. at 500.

[25] *National Association for the Advancement of Colored People, etc. v. Button*, U. S. , 31 U. S. L. Week 4063, 4067 (U. S. Jan. 14, 1963).

[26] See analysis of sociological studies on this point in Judge Frank's concurring opinion in *U. S. v. Roth*, 237 F. 2d 796, 804, (2d Cir. 1956); Lockhart & McClure, *Obscenity and the Courts*, 20 Law and Contemp. Probs. 587, 595 (1955); Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1942);

(*Continued on following page*)

Of itself, "this absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control."[27]

A most recent study by Cairns, Paul and Wishner[28] reveals useful information of a more positive nature. Using sexual arousal as a physiological phenomenon more easily measured than "prurient interest," whatever the precise meaning of the latter term may be, the findings of the authors (two behavioral psychologists and a professor of law), after an examination of the psychological abstracts and a number of human experiments, are interesting and illuminating:

"1. A significant proportion of our society is sexually aroused to some extent by some form of sex stimuli in pictures and probably in books.

2. Portrayals of female nudity and of sexual activity lead to sexual arousal in many males—adolescents as well as adults. These materials arouse females far less frequently.

3. Females, on the other hand, are more frequently sexually aroused than men by complex

---

(*Continued from preceding page*)

see also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in *U. S. v. Roth, supra*); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 387 (1954); and see *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949).

---

[27] Douglas, J. dissenting in *Roth*, 354 U. S. 476, 511 (1957).

[28] *Cairns, Paul and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 (May, 1962).

stimuli which portray 'romantic' or 'love' relationships and which constitute, in general, less direct sexual cues.

4. Males differ among each other in terms of preference for and response to various types of sex stimuli. Factors which account for different preferences among males for viewing sexually relevant materials include: adequacy of masculine sexual identity, strong guilt with respect to sexual behavior, physical maturity and intellectual ability.

5. The environmental circumstances under which the sex stimuli are viewed may influence the extent to which the viewers will show evidence of sexual arousal. It is not clear, however, whether the failure to observe evidence of sexual arousal is due to the fact that no arousal occurred or that the overt expression of the arousal was inhibited.

6. Exposure to certain types of sex stimuli is, for some persons, both males and females, a distinctly aversive experience. Sexual guilt appears to be an important determinant of the extent to which viewing sexually relevant material will be considered an unpleasant event."

These findings with respect to *sexual arousal*—which probably is a lesser physiological or emotional reaction than *arousal of prurient interest*—demonstrate on the basis of scientific evidence what those who have considered the social problem of obscenity for years have known: that there are so many environmental and personality variables in the arousal of lustful thoughts or prurient interest that the determination of the precise books or pictures which are universally sexually stimulating is a metaphysical quest foredoomed to failure. What is sexually arousing to males holds no prurient interest to females; what excites lustful thoughts in females has no particular sexual effect upon males and is so widespread

throughout our culture as to be impossible to eradicate by criminal prosecutions. Personality, maturity and intelligence differences and varying quantities of guilt feelings about sexual matters cause vast differences in sexual response to the same stimuli even among males. What is sexually arousing to some is disgusting to others. The environmental factors under which sexual material is seen cause significant differences in response in both males and females. As Judge Bok wisely observed, more than a decade before this study:

> "If [the individual] reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book, or another? When, where, how, and why are questions that cannot be answered clearly in this field * * * in a field where even reasonable precision is utterly impossible, I trust people more than I do the law." *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 137 (1949).

One more matter of concern with regard to the "prurient interest" and "lustful thoughts" language in *Roth*: since obscenity is defined as "material that *appeals* to prurient interest" and equated with "material that has a *tendency* to excite lustful thoughts," what kind of a showing is necessary to establish that the material to be judged actually has the *effect* of arousal or excitement? Must a causal relationship be demonstrated between the publication and the pruriency, between the literature and the resultant lust, or will such "appeal" or "tendency to excite" be presumed? What standards are to be applied to determine the *appeal* and the *tendency* of the disputed ma-

terial? Or is the intention of the creator of the book or picture controlling? What of the literary pandered whose intent is vile but whose book or picture fails to achieve his evil goal?

These questions remain unanswered and are, we suspect, unanswerable.

Thus, the determination of what arouses "prurient interest" or excites "lustful thoughts" is a vast guessing game, with the constitutional right of freedom of expression and the suppression of literature and art hanging in the balance.

B. Contemporary Community Standards.

The "contemporary community standards" test in *Roth* likewise provides constitutional problems because:

1. It is too vague to inform and therefore violates due process of law by not providing an ascertainable standard of guilt.

2. It exposes the basic constitutional rights guaranteed the individual to the vagaries of public opinion in violation of the First and Fourteenth Amendments.

3. The application and administration of the standard, even if it is otherwise constitutional, may violate due process of law contrary to the Fourteenth Amendment.

These difficulties are considered in sequence below.

1. The "contemporary community standards" test is too vague to inform and therefore violates due process of law by not providing an ascertainable standard of guilt.

No survey beyond the data of common sense is required to establish that there is no one community of thought in the United States on matters of morals, politics,

economics, sociology or aesthetics. Indeed, on any particular subject of broad and controversial interest there are a multitude of communities of opinion.[29] For each of these there are subdivisions and sub-subdivisions. Even a referendum on a particular issue would do no more than clock the momentary division of view within the particular grouping.

This Court, in *Roth v. United States*, adopted "contemporary community standards" as one element in the determination of obscenity. No doubt some guidance for inferior courts was intended by the adoption with approval of the charge of the *Roth* trial court:

> "* * * you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

But the approved language leaves many aspects of the "community" definitions unresolved. Lower courts, confronted with the inescapable necessity for applying the standard, have either avoided its difficulties by ignoring them or have grappled with the issue with kaleidoscopic consequences. Although neither uniformity nor clarity has been the end product of these various efforts, the reported decisions are amenable to rough classification. Some simply recite the *Roth* definition and hold it applicable without analysis.[30] In one decision the federal district was

---

[29] A few categories that come to mind readily are the geographic, age, religious, ethnic, nationality, economic, social, fraternal, professional, theatrical, educational, scientific, farming, educated and uneducated.

[30] *Ohio v. Jacobellis*, 173 Ohio St. 22, 25-26 (1962); *United States v. Keller*, 259 F. 2d 54, 57-59 (3rd Cir. 1958); *Alexander*

(*Continued on following page*)

apparently used to define the geographic boundaries of the "relevant" community:

> "As intended by the Congress, a jury drawn from this district will be familiar with and best able to apply the local community standards in determining whether books were obscene and in violation of the statutes."[31]

But another district court in the same state, which may have been applying a district standard, implied a *minimum* universal standard—perhaps in dictum:

> "* * * There must however, be some constancy in morality—some things which, without reference to time and place, will offend the decent instincts of any

---

(*Continued from preceding page*)

v. United States, 271 F. 2d 140, 145-146 (8th Cir. 1959); *Collier v. United States*, 283 F. 2d 780, 781-782 (4th Cir. 1960), cert. denied 365 U. S. 833 (1961); *United States v. Oakley*, 290 F. 2d 517, 519 (6th Cir. 1961), cert. denied 368 U. S. 388 (1961); *Ackerman v. United States*, 293 F. 2d 449, 451 (9th Cir. 1961), refusal to qualify the *Roth* standard so as to make it inapplicable to non-commercial private correspondence; *Womack v. United States*, 294 F. 2d 204, 205-206 (D. C. Cir. 1961), cert. denied 365 U. S. 859 (1961); in *Sunshine Book Co. et al. v. Summerfield*, 249 F. 2d 114, 118 (D. C. Cir. 1957), the court quoted the *Roth* test and held the trial judge correctly applied it. In so doing, however, it appears that the trial judge affirmed a finding by the Post Office Solicitor that the offending photos were "obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of this country * * *" p. 115, reversed 355 U. S. 372 (1958); *Poss v. Christenberry*, 179 F. Supp. 411, 415 (S. D. N. Y. 1959); *Zenith International Film Corp. v. Chicago*, 291 F. 2d 785, 789 (7th Cir. 1961); *Kahm v. United States*, 300 F. 2d 78, 82-84 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962).

---

[31] *United States v. West Coast News Co.*, 30 F. R. D. 13, 19 (W. D. Mich. 1962); cf. *United States v. Frew*, 187 F. Supp. 500, 506 (E. D. Mich. 1960); but see *Mounce v. United States*, 247 F. 2d 148 (9th Cir. 1957), in which the court applied the standard of the community where the material "circulated," *vacated and remanded*, 355 U. S. 180 (1957) and *Lerner v. State*, 81 N. E. 2d 282 (1948). In *Lerner*, long before *Roth*, an Ohio Common Pleas Court thought the "moral concepts of the people of this state, as to what is obscene literature, is the only test allowable."

community however prudish or however sophisticated." [32]

A minority of this Court has indicated that the community of the *Roth* standard ought to be national, at least in interpreting a federal statute:

> "There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, [Title 18 USC § 1461] reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." [33] (Brackets supplied.)

Other cases meld "average person" and "contemporary community standards" themes into one test.[34] In still others the "aggregate" sense of the community may be ignored, and, it seems, the contemporary standards of the

---

[32] *United States v. Frew*, *supra*, p. 506. Cf. *Columbia Pictures Corp. v. Chicago*, 184 F. Supp. 817, 818 (N. D. Ill. 1959), where the motion picture "Anatomy of a Murder" was found not obscene or immoral and neither the word "rape" nor "contraceptive" offended the "common conscience of the general public."

[33] *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 82 S. Ct. 1432, 1437 (1962), but see Harlan, J., dissenting in *Roth v. United States*, *supra*, pp. 505-506. Cf. *Klaw v. Schaffer*, 151 F. Supp. 534, 538 (S. D. N. Y., 1957), where a national standard was applied. The test being the effect on "* * * the normal average male, offending the present and prevailing standards of decency, modesty and morality *of the country*." (Emphasis supplied.) Aff. 251 F. 2d 615 (1958), remanded with instructions to dismiss, 357 U. S. 346 (1958). Query, whether the omission of reference to females is of significance in that it implies a double standard. See also *Flying Eagle Publications, Inc. v. United States*, 273 F. 2d 799, 803 (1st Cir. 1960), in which the problem of many communities with differing standards was discussed but the test applied obscure.

[34] *Big Table, Inc. v. Schroeder*, 186 F. Supp. 254, fn. 2 at p. 256 (N. D. Ill. 1960); *Mounce v. United States*, *supra*; *Flying Eagle Publications, Inc. v. United States*, *supra*, p. 804.

homosexual community substituted where the material is aimed at the latter.[35] In the same spirit are those cases which apply the test of probable prurient interests appeal in the community of those likely to be reached.[36]

Clearly any test that selects a *part* of the community as the critical segment for gauging the contemporary standards defies *Roth v. United States*[37] and steps backward toward *Hicklin*.[38]

Some of the variations in phrasing the community standard might be considered relatively unimportant, simply expressing the same idea in different words. But mere verbal differences are confusing[39] nonetheless and other discrepancies such as those between local or national communities and the whole or a segment of the relevant community are real enough and confusing as well.

Mr. Justice Frankfurter implicitly (albeit unintentionally) condemned the ephemeral and therefore vague qualities of the test when he said:

---

[35] Cf. *Klaw v. Schaffer, supra*, pp. 533-539, materials tending to stir the lust of a sex deviate is non-mailable; see also *Manual Enterprises, Inc., et al. v. Day*, 289 F. 2d 455, 456 (D. C. Cir. 1961), *reversed* 370 U. S. 478 (1962).

[36] *United States v. 31 Photographs*, 156 F. Supp. 350, 354-355 (D. C. S. D. N. Y. 1957) (Forfeiture of materials being imported by Institute for Sex Research, Inc., at Indiana University denied).

[37] *Supra*, at p. 490 where the charge approved by this Court specifically proscribed the "particular segment" measure. Cf. *Butler v. Michigan*, 352 U. S. 380 (1957).

[38] *Regina v. Hicklin*, L. R. 3 Q. B. 360 (1868). I.e., one aspect of the *Hicklin* test is the effect upon particularly susceptible persons. *United States v. 31 Photographs, supra*, adopts a platonic standard and is the reverse of the *Hicklin* measure.

[39] The confusion in verbiage may originate in part with the charge approved in *Roth*. That charge, recited in parts relevant to this point at 354 U. S. 490, includes the phrases: "average person in the community," "present-day standards of the community" and the "common conscience of the community by present-day standards."

"Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? * * * Changes in the intellectual and moral climate of society * * * afford shifting foundations for the attribution. * * *"[40]

One need not stretch a hundred years for a "shift" in standards, nor indeed for a hundred minutes, if the switch is from place to place.[41] Whether there are significant differences or not in the phrases "contemporary community standards," "average person in the community," "common conscience of the community by present day standards," "common conscience of the general public" or any other form of words for a comparable idea, the perceptive remarks of Judge Frank have an increasingly obvious contemporary relevance:

"If we accept as correct the generally current judicial standard of obscenity—the 'average conscience of the time'—that standard still remains markedly uncertain as a guide to judges or jurors—and therefore to a citizen who contemplates mailing a book or picture. To be sure, we trust juries to use their common sense in applying the 'reasonable man' standard in prosecutions for criminal negligence (or the like); a man has to take his chances on a jury verdict in such a case, with no certainty that a jury will not convict him although another jury may acquit an-

---

[40] *Smith v. California, supra*, 165-166. Justice Frankfurter was explaining that "contemporary community standards" did not depend upon the idiosyncratic experience of judge or juror.

[41] Cf. "We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the county access to material there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." Mr. Justice Harlan speaking for himself and Mr. Justice Stewart in *Manual Enterprises, Inc. v. Day, supra*, p. 1437.

other man on the same evidence. But that standard has nothing remotely resembling the looseness of the 'obscenity' standard."

"There is a stronger argument against the analogy of the 'reasonable man' test: Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment." [42]

2. The "community" standard exposes the basic constitutional rights guaranteed the individual to the vagaries of public opinion in violation of the First and Fourteenth Amendments.

But even if the community test survives the charge of unconstitutional cloudiness, it cannot, by simple certitude, surmount the charge of unreasonable regulation.

The blunt language of dissent in this court has stated the rationale for the proposition of this section. We cannot improve it: [43]

"* * * the trial judge in the *Roth* case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends 'the common conscience of the community.' That standard is, in my view, more inimical still to freedom of expression.

"The standard of what offends 'the common conscience of the community' conflicts, in my judgment, with the command of the First Amendment that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

---

[42] *U. S. v. Roth*, 237 F. 2d 796, 826-827 (2nd Cir., 1956), Frank concurring.

[43] *Roth v. United States*, 354 U. S. 476, 511-513. (Douglas, J.)

"Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, jurors can censor, suppress, and punish what they don't like, provided that matter relates to 'sexual impurity' or has a tendency 'to excite lustful thoughts.' This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win."

* * * * *

"I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community. I can understand the motives of the Anthony Comstocks who would impose Victorian standards on the community. When speech alone is involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any of these movements. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

"The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed."

3. The application and administration of the standard, even if it is otherwise constitutional, may violate due process[44] of law contrary to the Fourteenth Amendment.

Further complications calculated to confuse the regulated arise from the diversities of view in the lower courts on the admissibility of proof establishing the community standard. Apart from the effect the proof of such standards may have on *scienter*,[45] the same evidence may be highly important in determining the *fact* of obscenity.

Mr. Justice Frankfurter has asserted constitutional status for expert evidence of community standards:

> "Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case." [46]

But Mr. Justice Harlan thought a state might provide, following its traditional doctrines of evidence, that community standards not be a subject of expert testimony.[47]

There are other means of proof. These, too, are controversial and the lower courts have held both ways with respect to admissibility. For example, the trial court in *Klaw v. Schaffer*, *supra*, excluded proofs offered by the complainant:

> "The plaintiff complains that a number of exhibits, which were marked for identification, consti-

---

[44] The cases discussed below are principally cases arising in the federal jurisdiction. However, the problems posed are due process problems grounded in the application of the contemporary community standards test and the issues raised admit no distinction based simply upon the duality between federal and state law.

[45] See *Smith v. California*, *supra*.

[46] *Id.*, p. 166.

[47] *Id.*, p. 172.

tuting erotic displays at least as brazen as his photographs, were excluded by the Hearing Examiner. If these exhibits were offered in proof of a community standard, it was unnecessary to receive them. The finder of fact in an obscenity issue is no more required to consider proof of moral standards of a community than is a jury in a negligence case required to consider proof of the standard of due care. The issue of fact to be tried is whether the material in question is obscene under the standard laid down by the law, and the standard itself is not in issue."[48] 151 F. Supp. 534 at 540.

To the contrary on the admissibility issue are *Poss v. Christenberry, supra; Grove Press, Inc. v. Christenberry.*[49]

The Fifth Circuit has held recently that proof of contemporary community standards by the government is not essential to a prima facie case.[50] The rule implies that prosecution may convict without proof. Such implications raise patent problems of due process.

---

[48] For a compelling rebuttal of the analogy to the reasonable man test see Frank, J., concurring in *United States v. Roth*, 237 F. 2d 796, 826-827 (2nd Cir. 1956).

[49] 175 F. Supp. 488, 502 (S. D. N. Y. 1959), *aff'd* 276 F. 2d 433 (2d Cir. 1960); see *Zenith International Film Corp. v. Chicago*, 291 F. 2d 785, 789 (7th Cir. 1961), but cf. *Big Table, Inc. v. Schroeder, supra*, p. 261, where it was said that absent a contrary showing it must be held that the official who functions as a trier of the facts has applied the contemporary standards as an average member of the community. In *Womack v. United States*, 294 F. 2d 204, 206 (D. C. Cir. 1961), a customary pre-requisite to the use of expert psychiatric and psychological testimony, i.e., proof of qualification, was avowed but the Court went on to say that the introduction of commercial magazines displaying nudes was of no importance. If the cloth, said the Court, is "bright red" and in evidence, then no testimony is admissible, whether lay or expert, to show the "cloth is blue." Presumably the aim of the proffered evidence was not to change colors but only to show what was popular that season.

[50] *Kahm v. United States*, 300 F. 2d 78, 84-85 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962).

The obvious conclusion is *not* that guidance from this court is needed to firm up the concept and understanding of community standards for the benefit of the lower courts to the end that constitutional levels of certainty may be attained. On the contrary, the conclusion ought to be that the test is inherently impossible of constitutional delineation and therefore should be abandoned in favor of including all forms of expression, including obscenity, within the protections and limitations of the First and Fourteenth Amendments.

C. The "Average Person."

While the substitution in *Roth* of "the average person" for "particularly susceptible persons" as the subject whose sexual arousal is the litmus of obscenity represents a logical liberalization of the *Hicklin* rule, this portion of the *Roth* obscenity test presents monumental problems as well.

Although it is now clear that neither what can safely be shown to children[52] nor to the emotionally unstable among us[53] provides an acceptable constitutional standard for censorship of obscenity, the positive determination of who is "the average person" to which *Roth* refers has few guidelines. He has been identified as the counterpart, in the law of obscenity, of the "reasonable man" in the law of torts.[54] But the delineation of the conduct of a "reasonable man" in negligence suits does not determine whether

---

[51] See *Winters v. New York*, 333 U. S. 507, 515-516, 520 (1948).

[52] *Butler v. Michigan*, 352 U. S. 380 (1957).

[53] *Roth v. U. S.*, 354 U. S. 476 at 488-489.

[54] *U. S. v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S. D. N. Y. 1933), *aff'd* 72 F. 2d 705 (2d Cir. 1934). Cf. Judge Frank's critique of the "reasonable man" test in *U. S. v. Roth*, 237 F. 2d 796, 826-827 (2d Cir. 1956) (concurring opinion).

basic constitutional protections are to be granted or withheld, as in the area of obscenity censorship. And the analogy further breaks down when one considers that, since the vast majority of people neither know nor care about literary or artistic qualities,[55] the standard of the composite fiction of "the average person" will include multitudes who were never intended to be the audience for the particular tract or motion picture in question and who, but for the publicity resulting from the obscenity prosecution, would never have experienced it. Moreover, one may well ask: Is the "average person" composite to be drawn from the 95% of the total male population who would be convicted if the sex laws now on the books were strictly enforced?[56]

Is a tract designed for a special audience to be judged by the standard of "the average person" outside the group?[57]

What of foreign movies imported, as here, to be shown in "art" motion picture houses? Is it the "average" art theater patron whose prurient interest is in issue in this context?

Moreover, if the test of obscenity is to turn upon the nature of the audience which is exposed to it, would it not be curious to find that the publicity surrounding an obscenity prosecution could, by calling the attention of the prurient-minded public to it, change the composition

---

[55] *Commonwealth v. Isenstadt*, 318 Mass. 543, 553, 62 N. E. 2d 840, 846 (1945).

[56] *Kinsey, Sexual Behavior in the Human Male* (1948), at 217 et seq.; *Report of the Committee on Forensic Psychiatry*, Group for the Advancement of Psychiatry (No. 9, Rev. 1950); Kronhausen, *Pornography and the Law* (1959), at 155 et seq.

[57] *Cf. Manual Enterprises, Inc. et al. v. Day*, 370 U. S. 478, 82 S. Ct. 1432, 1434 (1962).

and size of the audience so as to render material obscene which at the outset of the prosecution clearly was not?

The concept of "the average person" distintegrates completely as a valid test when it is applied to what has been described as "hard core" pornography.[58] It has been widely noted that "'hard core' pornography, far from having appeal to normal or 'average' persons, is disgusting to them; it seems to appeal only to the sexually inadequate: 'the frightened, the impotent, the bored and sated, the senile * * * the adolescent * * * not yet old enough to seek sexual partners or * * * [the person who] has lost the precious power of spontaneous sexual feeling.'"[59]

Thus, even assuming a case dealing with "hard core" pornography, the "appeal to the average person's prurient interest" test is entirely useless because pornography is "appealing" only to the decidedly "non-average" individual and is repulsive to "the average person" in the standard.

D. Determining What is "Utterly Without Redeeming Social Importance."

In *Roth* the Court described obscenity which was not constitutionally protected as "utterly without redeeming social importance." Presumably the Court has embarked upon the project of determining which books and pictures

---

[58] Brief for the United States, pp. 37-39 in *Roth v. U. S.* *op. cit.*

[59] Margaret Mead, *Sex and Censorship in Contemporary Society*, New World Writings (Third Mentor Selection 1953) at pp. 18-19; and see D. H. Lawrence, *Pornography and Obscenity in Sex Literature and Censorship* 74-77 (1953): "[Pornographic books] are either so ugly they make you ill, or so fatuous you can't imagine anybody but a cretin or a moron reading them, or writing them."

have any social importance, at least as to those which might otherwise be obscene. We suggest, as did Mill, that "the usefulness of an opinion is itself matter of opinion: as disputable, as open to discussion, and requiring discussion as much as the opinion itself."[60]

Although the "social importance" standard was undoubtedly designed by this Court to protect expression which might otherwise be obscene, the judicial exploration of the social value of books or pictures as a factor in determining whether or not they should be suppressed is an imposing task which has dangerous implications to freedom of expression. As Mr. Justice Douglas has pointed out:

> "The First Amendment * * * was designed to preclude courts as well as legislatures from weighing the values of speech against silence." *Roth v. U. S.*, 354 U. S. at 514 (dissent).

Or, to say it another way in the language of the Court, the "redeeming social importance" justifying the dissemination of all forms of expression, if not found in the work itself, is found in the fabric of freedom woven by its uncensored use.

Amici have attempted to demonstrate some of the areas of obscurity, difficulty and logical barrenness which arise in specific applications of the rule in *Roth* as a result of the refusal to apply the "clear and present danger" test in the obscenity area. We believe, as does Mr. Justice Harlan[61] that "it is no answer to say * * * that obscenity is not protected speech." Where matters of expression are involved, a failure to define precisely, accurately and with

---

[60] John S. Mill, *Essay on Liberty*.

[61] *Roth v. U. S.*, 354 U. S. at 507 (concurring in part and dissenting in part).

predictability the items which may be censored, cannot fail "to impose a severe limitation on the public's access to constitutionally protected matter," [62] both by misinterpretation of the stated tests by the lower courts and by the extrajudicial pressures of threatened prosecutions, [63] "under dangers which are hazarded only by heroes." [64]

In the view of *amici*, the attempt in *Roth* to differentiate between utterances which are constitutionally protected and those which are not, has been unsuccessful for vagueness, unworkability and, most important, the setting of standards to test expression which carry dangerous implications for the "fullest possible opportunity for the free play of the human mind." [65]

In view of this unsuccessful experiment in imposing substantive limits upon freedom of expression, there is even more validity to these words of Mr. Justice Douglas and Mr. Justice Brandeis now than at the time they were originally uttered:

> "* * * free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed.
>
> "The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 376-377.

---

[62] *Smith v. California*, 361 U. S. 147, 153 (1959).

[63] E.g. *New American Library v. Allen*, 114 F. Supp. 823 (N. D. Ohio 1953); *American Mercury, Inc. v. Chase*, 13 F. 2d 224, 225 (D. C. Cir. 1926); *Bantam Books Inc. v. Melko*, 25 N. J. Super. 292, 96 A. 2d 47 (1950).

[64] *Dennis v. U. S.*, 341 U. S. 494, 550 (1951) (Frankfurter, J., concurring).

[65] *Dennis v. U. S.*, *supra*, at 550 (Frankfurter, J., concurring).

"'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

* * * * *

"'Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'" [66]

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AS IT INCORPORATES THE FIRST AMENDMENT, REQUIRES THAT THE SCIENTER NECESSARY FOR AN OBSCENITY CONVICTION BE KNOWLEDGE OF THE OBSCENE NATURE OF THE MATERIAL.

This Court has firmly established the principle that motion pictures as such come within the protection afforded speech and the press by the First Amendment [67] and that the due process clause of the Fourteenth Amend-

---

[66] *Dennis v. U. S., supra, at* 585 (Douglas, J., dissenting).

[67] *Mutual Film Corporation v. Industrial Commission*, 236 U. S. 230 (1915); *Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952).

ment incorporates within it the protections of the First Amendment.[68] Accordingly, state criminal convictions for the exhibition of allegedly obscene motion picture films [69] must satisfy or circumvent the requirements of the First Amendment.

In *Smith v. California*, 361 U. S. 147 (1959) the Court held that the element of *scienter* is an absolute prerequisite of a conviction of distributing obscene material. There the Court was dealing with a city ordinance which required no element of *scienter* whatever and which was construed by the state courts as creating absolute criminal liability for mere possession of material later judicially determined to be obscene. Thus, the Court was able to fully satisfy its function of deciding only the case before it by declaring the ordinance unconstitutional for failure to require *any scienter* at all on the part of the accused. The Court expressly left open the question of what kind of *scienter* is necessary for a conviction under obscenity legislation. Justice Frankfurter noted in his concurring opinion:

> "How much or how little awareness that a book may be found to be obscene suffices to establish *scienter* or what kind of evidence may satisfy the how much or how little, the Court leaves for another day." 361 U. S. at 161.

"Another day" has now arrived. *Amici* submit that the heritage of freedom of this nation, the experience in the instant case, and the interpretation of the First Amendment by this Court all argue strongly for this rule:

> *To satisfy the requirement of scienter in a prosecution for disseminating obscene material, it must be*

---

[68] *Gitlow v. New York*, 268 U. S. 652 (1925).

[69] We do not consider whether in fact the motion picture "The Lovers" is an obscene film. However, it is assumed *arguendo* in this portion of the brief that the film is actually what might be termed an "obscene" motion picture, to spotlight the defectiveness of the finding of *scienter* here.

proved that the accused knew or should have known of the obscene nature of the material involved.

It is true that this Court expressly reserved judgment "on what sort of mental element is requisite to a constitutionally permissible prosecution," but there are clear indications in the *Smith* decision itself that the quantum of knowledge which the Court had in mind contemplated a degree of *scienter* which included some form of knowledge, either actual or constructive, of the *obscene nature* of the material in question, not merely bare knowledge of the *contents*.

In the very passage in which it reserves judgment on the point, the Court suggests the question "whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse." *Id.* at page 212. This Court is obviously concerned with knowledge of whether the "contents in fact constituted obscenity."

Earlier in its opinion, the Court states that:

> "Very much to the point here, where the question is the elimination of the mental element in an offense, is this Court's holding in *Wieman vs. Updegraff*, 344 U. S. 183, 97 L. ed. 216, 73 S. Ct. 215. There an oath as to past freedom from membership in subversive organizations, exacted by a State as a qualification for public employment, was held to violate the Constitution in that it made no distinction between members who had, and those who had not, known of the organization's character." *Id.* at page 210.

The distinction drawn in the offending statute in *Wieman* was not between persons who knew merely the *identity* of the organization, and those who did not, but between those who knew its *character* and those who did not.

Mr. Justice Frankfurter, in one of four concurring opinions, summarized the Court's disposition of the case by saying that the Court held that the "liberty protected

by the Due Process Clause of the Fourteenth Amendment precludes a State from making the dissemination of obscene books an offense merely because a book in a bookshop is found to be obscene without some proof of the bookseller's *knowledge touching the obscenity of its contents.* * * * The Court accepts the settled principle of constitutional law that traffic in obscene literature may be outlawed as a crime. But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with *knowledge of the obscenity.*" *Id.* at page 215. (Emphasis added.)

Mr. Justice Harlan took a similar view of the meaning of the Court's decision:

> "Proof of *scienter* may entail no great burden in the case of obviously obscene material; *it may, however, become very difficult where the character of the material is more debatable.*" *Id.* at page 220. (Emphasis added.)

In this context it is clear that *scienter* refers to more than simple knowledge of the contents. For if the only requirement were proof of the knowledge of the contents, the character of the material (as being clearly obscene or "more debatable") would have no bearing on the difficulty of proof. It is only if the guilt requires knowledge of obscenity that it is easier to prove knowledge in the case of "obviously obscene material" than in the case of material the character of which is "more debatable."

Thus, whatever refinements of the kind of *scienter* necessary to a constitutional conviction this Court left "for another day," it is clear that they must at least include knowledge of facts which compel a judgment that the material is obscene, rather than mere knowledge of the contents of the questioned material alone.

In *Smith* this Court recognized that a state may, in the exercise of its police power, create criminal liability without the element of *scienter*, but added that this power is subject to the most unyielding restriction in situations where freedom of expression might be impaired. The Court stated at 361 U. S. 151:

> "* * * but where we conceived that this device [of dispensing with the element of *scienter*] was being applied in a manner *tending to cause even a self-imposed restriction* of free expression we struck down its application." (Emphasis supplied.)

And again at page 155 of the *Smith* case the Court repeated:

> "It is plain to us that the ordinance in question, though aimed at obscene matter, has such a *tendency to inhibit constitutionally protected expression* that it cannot stand under the constitution."

The Court's grave concern with that which only *tends* to inhibit free expression and that which only *tends to* cause self-imposed restrictions on free expression cannot be washed away in obscenity cases by a simple requirement that the accused know only the contents of the material involved. Such a rule of *scienter* would be as great a deterrent to free expression as no *scienter* requirement at all. Under such a rule, the disseminator of ideas would be criminally liable regardless of his judgment, regardless of the circumstances and factors existing at the time he made his judgment, and regardless of the complexity of the problem of making a judgment. He would guess wrong at his peril; it is a simple matter to predict that he would soon put himself in a position where he would never have to guess again—by cutting a wide swath around all questionable forms of expression.

This Court has made similar pronouncements in *Speiser v. Randall*, 357 U. S. 513 (1958) and *Wieman v. Updegraff*, 344 U. S. 183 (1952). Indeed, *Wieman* is precedent for the adoption of the *scienter* rule here proposed. In that case, this Court had before it a statute in which membership in subversive organizations was a bar to public employment. The statute was declared unconstitutional because of its failure to require that the member of the organization have knowledge of the subversive character of the group. The Court stated:

> "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." (344 U. S. 183, 191.)

The facts in the case at bar are at least as compelling as those in the *Wieman* case, which required knowledge of the *nature*, not the *fact*, of the association there involved. Whereas, in *Wieman*, the by-product of an inadequate *scienter* requirement would have resulted in impairment of the right of political association, here the requirement of a lesser standard of knowledge would result in suppression of the free flow of ideas. If infringement of one basic First Amendment right justifies a strict *scienter* requirement for a constitutionally valid conviction, there is no reason why the danger to another freedom stemming from the same source (freedom of expression) should not require a similar result.

Since its statements on the *scienter* test in the *Smith* case, this Court in *Manual Enterprises, Inc. et al. v. Day*, 370 U. S. 478 (1962) again saw fit to comment on the *obscenity scienter* rule without being faced directly with the question as it is presented here.

In the *Manual Enterprises* case, an injunction action was brought by publishers of magazines held to be nonmailable by the Postmaster General because they con-

tained obscene matter and because they contained advertisements indicating where obscene matter could be obtained. That portion of the opinion dealing with the advertisement is instructive here. The opinion notes that the advertisers were found to possess photographs which "undoubtedly" may be regarded as "hard core" pornography. The Court went on to say that *scienter* was a necessary element of the wrongful act on the part of the publisher, but that the scope of *scienter* which is constitutionally adequate had not been fully decided in the *Smith* case. Mr. Justice Harlan and Mr. Justice Stewart in *Manual Enterprises* then took an important step toward deciding that question. They found the element of *scienter* lacking:

> "He [publisher's president] thus was afforded no opportunity *to judge for himself* as to its alleged obscenity." (Emphasis supplied.) (82 S. Ct. 1440.)

The publisher there did not examine the literature of his advertiser. Thus, these members of the Court might have held there to be a lack of *scienter* because of failure to merely know the *contents* of the material. Instead, they noted significantly that the publisher did not have an opportunity to "*judge* for himself *as to its alleged obscenity*."

It will perhaps be argued by those opposing a *scienter* rule requiring knowledge of the *obscenity* that such a rule renders it impossible to secure a conviction.

This argument has already been anticipated and met by the Court. In *Smith*, at 361 U. S. 154 the Court remarked that "* * * it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind." Justice Harlan in his opinion in the *Smith* case at 361 U. S. 170, in which he concurred in part and dissented in part from the Court's opinion, noted that the "hard core" area was another in which the problem could

be easily met. He stated there that "proof of *scienter* may entail no great burden in the case of obviously obscene material." But, one might ask, if the *scienter* required is knowledge of obscenity, how can the State ever obtain the first conviction with reference to any particular work of literary or motion picture art? Proof of the required knowledge will not always necessitate a prior conviction and knowledge thereof. The first defendant can be convicted if the work is in fact found to be obscene and if the prosecution can prove that the defendant knew or should have known that it was obscene. Upon what proof may a jury so find? It may consider any or all of several factors:

(1) If the material in fact is in the class generally known as "hard core" pornography, i.e. if it is so clearly obscene that it would be almost universally so adjudged;

(2) if it has in fact been universally or nearly universally so adjudged, by reputable critics, or

(3) if, although there have been no convictions in connection with the particular work, there have been convictions *of which the accused had actual knowledge* in connection with work so similar in character as to give warning to defendant that the work in question might also be found obscene.

On the other hand, in the absence of these circumstances, defendant cannot be found to have had knowledge of the obscenity, even though he might have had specific knowledge of the work's contents, if he had concluded, in good faith, that it was not obscene.

If this test results in the acquittal of some guilty persons, this is a risk which a free society must take in order to preserve the freedom of thought and expression which it guarantees its citizens.

The Ohio courts in this case failed to apply the *scienter* test requiring knowledge of the obscenity. That knowl-

edge, the evidence overwhelmingly demonstrates, defendant-appellant did not have.

It has been noted above that the Court in the *Smith* case remarked that it was indicating only that *scienter* was required and leaving to another appropriate case the determination of the kind of *scienter* needed for an obscenity conviction. This case squarely presents appropriate occasion for clarifying the *scienter* rule.

A brief discussion of the *scienter* test applied by the Ohio Supreme Court is, therefore, in order. In *State v. Jacobellis*, 173 Ohio St. 22 (1962), the court ruled that mere knowledge of the *contents* of the film is sufficient and thus upheld the conviction. The court gave lip service to the desired rule that knowledge of the *obscenity* is required when it stated that "* * * such knowledge must necessarily relate to the knowledge of the obscenity of the contents * * *," at 173 Ohio St. 25. However, a closer look at the opinion and facts leaves no doubt that the Ohio court applied a "knowledge of contents only" test. The infinitely complex questions of regulation of obscenity, and its relationship to free expression which have so troubled this Court and all other thoughtful minds presented no problem at all to the Ohio Court. In cavalier fashion, the question of obscenity was dismissed:

> "There is no real or actual ambiguity in the phrase [*Roth* definition of obscenity]. No undue burden is placed on the possessor of such literature, for even though the individual himself might not consider the subject matter obscene, it is indeed the isolated and uninformed person who would not know as a matter of fact what is obscene by the usual community standards. * * *" 173 Ohio St. 25-26 (bracketed material supplied).

The flavor of the Ohio court's approach to the question is also well displayed by that court's introduction of a

new restriction on the right to constitutional protections. The court said:

> "The producers, distributors and exhibitors evidenced so little responsibility in connection therewith, that *they have no right to assert constitutional guaranties* which require a high degree of responsibility from those who seek their protection." (Emphasis supplied.) 173 Ohio St. 28.

Suspiciously akin to the argument that guilty men are not entitled to due process of law (the underlying precept of mob rule), this language violates such basic principles of constitutional law as to require instructive comment by this Court.

Indeed, the Ohio court did not even require that the defendant know the contents of the film. It stated at 173 Ohio St. 26-27 that, "* * * where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene * * *" then the possessor should not exhibit them.

But the court gave no clue as to the application of this novel test to the facts of the instant case. It merely said:

> "The third and fourth [assignments of error] emphasize facts and the weight of the evidence, which we shall dispose of in the perfunctory manner, as the law requires of this court, in a short paragraph later in this opinion." 173 Ohio St. at 24.

This promise was fulfilled only as follows:

> "The third and fourth assignments of errors raise questions as to factual issues and the weight of the evidence. These issues have been resolved in the proper forums." *Id.* at 28.

The undisputed facts of this case overwhelmingly demonstrate the State's failure to prove the constitutionally required element of *scienter* requiring knowledge of obscene contents.

1. This film was not shown anywhere in the Greater Cleveland community prior to its showing by defendant.
2. There was no pending litigation involving this film at the time defendant was arrested.
3. This foreign film was admitted by the Bureau of Customs of the United States Treasury Department which made the express ruling that the film was not obscene.
4. The film received favorable critical acclaim from reviewers in many highly regarded publications, including, but not limited to, the following:
   a. Saturday Review of Literature.
   b. New York Times.
   c. New York Herald-Tribune.
5. The film won a second prize award at the Venice International Film Festival of 1958.
6. The film received honors at a South American Film Festival.
7. Defendant was aware of all these facts at the time of his arrest.

The prosecution has elaborately set forth in the appendix of its motion to dismiss various newspaper advertisements of the film in question, apparently to demonstrate the obscene knowledge of the defendant-appellant at the time of exhibition. That the advertisements suggest that the movie in question portrays sexual subject matter realistically is self-evident. But, as this Court has pointed out in *Roth*:

> "* * * sex and obscenity are not synonymous. * * * Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." 354 U. S. 476, 487.

Recognizing the tendency of advertisers of all commodities for sale in our society (movie exhibitors included) to take advantage of this "great and mysterious motive force in human life," in their ads, it appears to us that to find the requisite obscene knowledge of the exhibitor in an advertisement accepted for publication by a family newspaper would obliterate the constitutional requirement of *scienter* altogether.

The Ohio Supreme Court not only failed to look to the defendant's knowledge of obscenity, but erred to an even greater degree. It stated that defendant should have known this movie was obscene because this was general knowledge in the community:

> "* * * neither, however, can he profess ignorance of that *which has become general knowledge in the community*. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge *and are generally known to be obscene* as judged by the above test, then the duty devolves * * * to refrain from exhibiting * * *." 173 Ohio St. 26-27. (Emphasis supplied.)

This opinion of the Ohio court demonstrates, to say the least, a lack of understanding of the *scienter* requirement for obscenity convictions. It and other inferior federal and state courts need guidance in determining the quality of *scienter* which is constitutionally necessary. By any constitutional standard, no obscene knowledge has been shown in the record here.

The clear effect of this conviction upon a finding of obscene knowledge on these facts is to unconstitutionally inhibit free expression. Although in *Smith v. California*, 361 U. S. 147 (1959), the Court was speaking of books and booksellers, the same reasoning applies to the motion picture field:

"* * * the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. * * * The bookseller's * * * timidity in the face of his absolute criminal liability thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded." 361 U. S. 154.

While *amici* are more deeply committed to the proposition that all utterances must be tested by the principles and limitations provided by the First and Fourteenth Amendments (Arguments I and II above) and would hope that the Court would set aside the instant conviction on this broad ground, if this Court should refuse so to rule, we would then urge the Court to delineate the precise nature of the knowledge necessary to support a constitutionally valid obscenity conviction to "provide some small degree of safeguard to booksellers [and motion picture exhibitors] by making those who patrol bookstalls [and motion picture theaters] proceed less highhandedly than has been their custom." (bracketed material supplied.) *Smith v. California*, 361 U. S. 147, 169 (1959) (Douglas, J., dissenting).

IV. THE CONVICTION OF THE DEFENDANT-APPELLANT ON A COUNT OF POSSESSION AND CONTROL AND ALSO ON A COUNT OF EXHIBITION IS DOUBLE CONVICTION FOR THE SAME OFFENSE AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The original indictment in this case contained two counts, one charging *possession and control* of the film, the other charging its *exhibition*. On both counts the defendant was found guilty and on both counts he was duly sentenced: Five Hundred Dollars ($500.00) on the count of possession and control, Two Thousand Dollars ($2,000.00) on the count of exhibition. It is therefore obvious that the Court considered each of the two counts a distinct and punishable offense. It is submitted that in the context of the statute with which we are here concerned, the offenses are not distinct but, instead, inseparably intertwined.[70]

Before trial a bill of particulars was requested and it was supplied by the prosecutor. It alleges that the defendant is guilty of the possession and control charge by reason of his "position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations" of the theater; moreover, the bill of particulars informs us, the defendant is guilty of the exhibition charge by reason of his "position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations" of the theater.

---

[70] The relevant portion of the statute reads "No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film * * *." The penalty section of the same statute reads "Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both." Section 2905.34, Ohio Revised Code.

The evidence adduced at the trial by the prosecutor was confined to proof that the defendant had constructive possession and control and exhibited the film in his capacity as the theater manager. Thus, the indictment, the bill of particulars, the evidence introduced, and the common sense of the matter all underscore the conclusion that what is presented here is a course of action, a single transaction, composed, no doubt, of separately identifiable elements, but nevertheless indivisible when serving, as here, as the basis for multiple convictions.

The doctrine of multiple offenses or identity of offenses has led to the development of a series of judicial tests. Three are presented here in the belief that they are representative of the most universally held concepts in this complex area.

A. "The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of the transaction does not make a single offense where two are defined by the statutes." *D. C. v. Buckley*, 128 F. 2d 17, 19 (1942).

B. "Where several counts in an indictment charge in different ways the commission of the same offense, or charge the commission of different crimes or degrees of crime which, by reason of the fact that they are of the same character and grow out of the same transaction, are in effect parts or aspects of one offense, or where the crime charged in one count necessarily embraces the crime charged in another, it is erroneous for the court, on a finding of a general verdict or plea of guilty to impose separate penalties for the several counts, whether by way of separate sentences to run successively, or a single gross sentence lumping the several penalties. In such case accused is subject only to a single penalty on all counts constituting one entire offense, and the court may im-

pose such sentence on that count which charges the highest grade or degree of the offense involved, or which embraces the offense charged in other counts." 24 C. J. S., Criminal Law, Sec. 1567b(c).

C. "The distinction stated by Mr. Wharton is that 'when the impulse is single, but one indictment lies, no matter how long action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' *Wharton's Criminal Law*, 11th Ed., Sec. 34. Or as stated in note 3 to that section, 'The test is whether the individual acts are prohibited, or the course of action which they constitute.' If the former, then each act is punishable separately * * *. If the latter, there can be but one penalty.' " *Blockburger v. U. S.*, 284 U. S. 299, 302 (1932).

If each of the three tests is applied to the special fact situation here presented, it is plain that there is no basis for the double conviction. The *Buckley* test puts emphasis on the identity of the evidence required to sustain the convictions. Jacobellis could not have exhibited the film without possession or control of it. If the prosecuting officials inject the element of exhibition into the possession count to make it more than mere possession, the element is used up, consumed as it were, and is not available to support a separate count.

If the test expressed with clarity and definiteness in *Corpus Juris* is applied, the invalidity of the double conviction is immediately evident. Do we not here have a case in which "different crimes * * * are in effect parts or aspects of one offense"; in which "the crime charged in one count necessarily embraces the crime charged in another"?

The *Blockburger* test is especially appropriate and appears dispositive of the issue. It is a "course of action"

which the statute and the policy considerations that animate it seek to prohibit, the course of action of commerce in obscenity. The "impulse" was clearly a single impulse —an impulse to exhibit a film. To bisect the impulse into discrete parts may be of psychological interest but hardly sufficient justification for a multiplicity of criminal convictions.

It is noteworthy that there is judicial dissatisfaction with easy formulae in this area. The pre-eminent importance of personal rights demand that the courts do more than lay a yardstick next to a set of facts, take a measurement, and thus resolve the case.[71]

It is to this mechanistic and bloodless approach that Chief Justice Warren addressed himself in his dissenting opinion in *Gore v. U. S.*, 357 U. S. 386, 394 (1958): -

> "In every instance the problem is to ascertain what the legislature intended. Often the inquiry produces few if any enlightening results. Normally these are not problems that receive explicit legislative consideration. But this fact should not lead the judiciary, charged with the obligation of construing these statutes, to settle such questions by easy application of sterotyped formulae. It is at the same time too easy and too arbitrary to apply a presumption for or against multiple punishment in all cases or even to do so one way in one class of cases and the other way in another. Placing a case in the category of unit-of-offense problems or the category of overlapping-statute problems may point up the issue, but it does not resolve it."

---

[71] Ohio seems to have done just this in the only reported instance of a double conviction and punishment for possession and sale of obscenity, *Overmyer v. Sacks*, 174 O. S. 129 (1962). There is no discussion in the opinion of the special and related character of the two offenses charged; only general statements as to the authority of the legislature to split a transaction into several crimes.

Similarly, disenchantment with formulae is found in Judge Rutledge's concurring opinion in the *Buckley* case, *supra*, at page 22. There was no difficulty in denominating the offenses charged as separate offenses in this case, one being driving while intoxicated, the other driving on the wrong side of the street. But Judge Rutledge felt impelled to comment on the special duties of a court confronted with the multiple offense problem:

> "* * * On narrow technical distinctions of method, means and specific intent, men may be convicted of the same general offense once, twice or many times, simultaneously or successively, as the prosecuting officials determine in their discretion. Some of the refinements are so thin that, if they hold, the old and substantial protection against trial or conviction more than once for the same offense is but a shadow of its intended self. The 'same or different evidence' rule only points out the difference. It puts no limit on how narrow the legislature can make it. I think the courts have a duty to do that, as well as one to find out whether the legislature has made a difference. In other words, it is for them finally to say whether a distinction prescribed by the legislature is strong enough to overcome the constitutional guaranty. Under the 'same or different evidence' test alone, they well nigh abandon that function in some cases where difference is very slight."

This Court has repeatedly asserted its constitutional capacity to examine criminal procedures carried out by the states. Granting that the Due Process clause does not vest this Court with total control over state criminal practices in all their myriad and variable forms, there has long been recognition that when the states invade the sacred precincts of fundamental liberty, that Clause will be wielded in defense of that liberty. This point needs no elaboration beyond the succinct exposition of Justice Frankfurter in *Rochin v. California*, 342 U. S. 165, 169 (1952).

"However, this Court too has its responsibility. Regard for the requirements of the Due Process clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses.' *Molinski v. New York*, 324 U. S. 401, at 416-417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked fundamental,' *Snyder v. Massachusetts*, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty.' *Palko v. Connecticut*, 312 U. S. 319, 325."

Nor can it be reasonably claimed that to put mere possession outside the realm of punitive activity seriously hampers the state in its efforts to control traffic in pornography. It is only the traffic—in the form of sale, exhibition, or other means—that the state seeks to control. Indeed, the most practical means calculated to discourage possession of pornography (excepting only possession for private titillation, a form of possession which is psychological or social in origin and psychological or social in cure) is to enforce the laws proscribing its commerce.[72]

---

[72] That mere possession is not a criminal act is the view of the Ohio Supreme Court, *State v. Jacobellis*, 173 O. S. 22 (1962). *State v. Wetzel*, 173 O. S. 16 (1962). *State v. Mapp*, 170 O. S. 427 (1960). When this case was reviewed by this Court, *Mapp v. Ohio*, 367 U. S. 643 (1961), the views of the Supreme Court of Ohio were endorsed. At page 672, Justice Stewart said "* * * I am persuaded that the provision of Section 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based is, in the words of Mr. Justice Harlan, not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.'"

The very heavy burden that Ohio's accordion-like construction of the statute imposes on a defendant can be illustrated by a simple and not untypical situation. If a merchant of pornography sells his wares, he is guilty of violation of the statute and may be imprisoned for seven years. If it is determined that at the time of the sale he had possession or control of his merchandise (how he could effectuate a sale without possession or control at least of a constructive nature is a conundrum), he is guilty on another count and may be imprisoned for a total of fourteen years. If in the course of negotiation, his customer should exercise his prerogative of asking for an inspection of the material before he hands over his money, the merchant is guilty on the count of exhibition and may be imprisoned for twenty-one years.[73] Yet it is plain that the Wharton "single impulse" test approved by this Court in the *Blockburger* case, *supra*, would not permit multiple convictions. The prohibited "course of action" is traffic, not the various steps leading to the prohibited act.

In other situations Ohio has set its face against multiple convictions.[74] What is sought here is neither an innovation in the law nor a departure from well-worn judicial paths in Ohio and elsewhere in the nation.

---

[73] The application of the maximum penalty is not an idle hypothesis. Jacobellis was not sentenced to jail but he was given the maximum fine of $2,000.00 on the exhibition count, and an additional $500.00 on the possession count. There was no legal impediment to levying $2,000.00 on this count as well. It may be, however, that the 4 to 1 disparity between the two fines is indicative of the Court's differing attitudes as to the relative significance of the offenses.

[74] Obtaining explosives, their possession, placing them on the premises of another person without his consent and exploding them causing damage to property, "constitute a single continuing criminal act, inspired by the same criminal intent and the accused is subject only to a single penalty therefor." *State v. Weed*, 169 N. E. 2d 39 (Ohio Ct. App. 1954). Ohio follows the "one transaction" test. In the same case at page 42, the Court says, "If such

(*Continued on following page*)

CONCLUSION.

It will be contended by those who would suppress all disagreeable or offensive art and literature that obscenity is a social problem which must be controlled, even at the expense of some unfortunate but necessary inroads upon free expression. While *amici* ordinarily take no position on social problems not related to civil liberties issues, some comment on this position is indicated in view of the rather broad positions taken in this brief.

A voyeuristic society which permits a cheap tract to become an all-time best seller may well have an illness which needs social treatment. But traffic in obscenity (which requires consumers as well as purveyors) is a symptom of a social problem rather than an evil *per se*. It is, therefore, hopelessly ineffectual to attempt to treat this problem solely by obscenity prosecutions, broad in scope, which ignore entirely the underlying cultural, social and personality factors which make autoerotic fantasy material attractive to large segments of the public.

As Mr. Justice Warren, concurring in the result in *Roth*, has cautioned:

> "To recognize the existence of a [social] problem * * * does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be con-

---

(*Continued from preceding page*)

unlawful act or acts constituted one transaction, there could be but one sentence. It is permissible to charge separate offenses in different counts and join them all in one indictment, however upon trial, *if the facts show but one transaction*, there can be but one sentence." (Emphasis added.)

sidered in the freedoms guaranteed by the First and Fourteenth Amendments." 354 U. S. at 495.

This case presents, upon its facts, an opportunity for this Court to re-examine: (1) its holding in *Roth* that obscene material is not within the protection of the First and Fourteenth Amendments, and (2) the verbal formula contained in *Roth* for determining what is constitutionally unprotected "obscenity."

The facts of the instant case also require consideration of the quality of *scienter* necessary to a constitutional obscenity conviction. Further, this case presents for determination the question whether conviction on separate counts for a single transaction is double punishment in violation of the Fourteenth Amendment.

Freedom of expression and due process of law require a reversal of the defendant-appellant's conviction for each of these reasons.

Respectfully submitted,

BERNARD A. BERKMAN,
1748 Standard Building,
Cleveland, Ohio,

JACK G. DAY,
1748 Standard Building,
Cleveland, Ohio,

MELVIN L. WULF,
156 Fifth Avenue,
New York, N. Y.,
Attorneys for
American and Ohio
Civil Liberties Unions.

HERBERT B. LEVINE,
1103 Keith Bldg.,
Cleveland, Ohio,

FRED P. SHAPIRO,
1804 Standard Bldg.,
Cleveland, Ohio,
Of Counsel.